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No. 11-0265

In The
Supreme Court of Texas

THE EPISCOPAL DIOCESE OF FORT WORTH, et al.,
Appellants,

vs.

THE EPISCOPAL CHURCH, et al.,
Appellees.

On Direct Appeal From the
141st District Court of Tarrant County, Texas
Cause No. 141-252083-11

REPLY IN SUPPORT OF EMERGENCY MOTION TO RECALL AND STAY ISSUANCE OF MANDATE OR TO STAY ENFORCEMENT OF MANDATE

TO THE HONORABLE SUPREME COURT OF TEXAS:

Appellants wish to deny the Episcopal Parties the same relief that they have enjoyed for over two years: preserving the status quo during appeal (or in this case, merely during a much shorter *request* for an appeal). Appellants' opposition is ironic, since they succeeded in staying proceedings below on the same logic while they took a direct appeal to *this* Court. As Appellants told the trial court, "a substantial amount of the Court's time and the parties' money must be spent—and

potentially wasted—if the remaining claims must be tried before there is an appeal. If the Court stays the proceedings on the remaining claims, this possibility is avoided with no damage to any party."[1]

The arguments supporting Appellants' opportunistic change of heart fall flat. They are belied by the position taken by their own parent organization, the Anglican Church in North America ("ACNA"), which told the U.S. Supreme Court just a few months ago that the issue of the proper interpretation of *Jones v. Wolf*[2] is substantial, federal, and ripe for adjudication—and that Supreme Court review would prevent unnecessary, costly litigation below. And they are belied by the arguments Appellants advanced while successfully seeking a stay of execution in this case—*while possessing the property*—for 11 months before this Court noted probable jurisdiction, and for another 26 months while the case was argued and pending. In short, the arguments Appellants themselves previously (and successfully) made in this case support affording the Episcopal Parties the very same relief.

This is what Rule 18.2 is for. A stay under Rule 18.2—far shorter than the one Appellants have enjoyed—is proper and warranted.

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[1] Defendants' (Appellants') Mot. to Sever and Stay Remaining Proceedings at 4, *Episcopal Church v. Salazar*, No. 141-237105-09.

[2] 443 U.S. 595 (1979).

I. The Episcopal Parties' Grounds for Petition are Substantial.

Appellants would deny the Episcopal Parties their rights under Texas Rule of Appellate Procedure 18.2 on the grounds that the U.S. Supreme Court grants review in few cases—and Appellants have already divined that Court's decision to deny *certiorari* in this case. Appellants' argument is misguided: on its face, Rule 18.2 turns on whether the petitioner's grounds are substantial—not on whether the opposing party likes the odds of a grant.[3]

Appellants' claim that these questions are not worthy of *certiorari* is particularly suspect in light of their parent organization ACNA's recent amicus brief to the U.S. Supreme Court—citing "the confused state of the law" under *Jones v. Wolf* and urging the Supreme Court to address the issue "that ***only*** it can resolve: . . . whether the First Amendment requires civil courts to enforce denominational rules that purport to recite an express trust in favor of the

[3] To the extent that statistics are relevant, recent actions of the Supreme Court of the United States in *Falls Church v. Protestant Episcopal Church in the U.S.*, 740 S.E.2d 530 (Va. 2013), *cert denied*, 82 U.S.L.W. 3237 (U.S. Mar. 10, 2014) (No. 13-449), indicate that the Court is *more* likely than usual to grant a petition for writ of *certiorari* in this case. In *Falls Church*, the Court called for a response to a petition, which is a "strong sign that the Court is interested in hearing argument." David C. Thompson & Melanie F. Wachtell, 16 Geo. Mason L. Rev. 237, 250 (2009). In fact, a call for a response "increases the probability that the Court will grant oral argument by roughly 9 times." *Id.* Moreover, the Court relisted the case for conference three times—another indication that the Court carefully considered taking the case. Because the instant case raises similar issues in a superior vehicle and raises the additional issue of unconstitutional retroactive application of neutral principles, the Court is likely to give a petition for writ of *certiorari* careful consideration.

hierarchical church."[4] The Beckett Fund for Religious Liberty has concurred, telling the U.S. Supreme Court, "there is an entrenched split of authority over the meaning of *Jones*" and "only this Court can resolve it."[5]

Of course, one difference (among others) between ACNA's failed request and the Episcopal Parties' is that the U.S. Supreme Court has consistently denied petitions where the Episcopal Church *prevailed* (four times since 2009, including the recent *Falls Church* case). The present case will be the first to arrive at the U.S. Supreme Court where the prevailing party was the breakaway faction taking property that it repeatedly swore to protect for The Episcopal Church.[6]

This is also the first case to present the retroactivity issue raised *sua sponte*

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[4] Brief of the Anglican Church in North America et al. as Amici Curiae in Support of Petitioners, *Falls Church v. Protestant Episcopal Church in the U.S.*, 2013 WL 6021151, at *1 (U.S. Nov. 8, 2013) (No. 13-449) (emphasis added) [hereinafter "ACNA Br."].

[5] Brief of the Beckett Fund for Religious Liberty as Amicus Curiae in Support of Petitioners, *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 2012 WL 1202303, at *6, *9 (U.S. Apr. 9, 2012) (No. 11-1101).

[6] *Compare Falls Church v. Protestant Episcopal Church in the U.S.*, 740 S.E.2d 530 (Va. 2013), *cert denied*, 82 U.S.L.W. 3237 (U.S. Mar. 10, 2014) (No. 13-449), *Episcopal Church in the Diocese of Conn. v. Gauss*, 28 A.3d 302 (Conn. 2011), *cert. denied*, 132 S. Ct. 2773 (2012), *In re Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009), *cert. denied sub nom. Rector, Wardens & Vestrymen of St. James Parish in Newport Beach*, *Cal. v. Protestant Episcopal Church in Diocese of L.A.*, 130 S. Ct. 179 (2009), *and Huber v. Jackson*, 96 Cal. Rptr. 3d 346 (Ct. App. 2009), *review denied*, No. S175401, 2009 Cal. LEXIS 9850 (2009), *cert. denied sub nom. St. Luke's of the Mountains Anglican Church in La Crescenta v. Episcopal Church*, 559 U.S. 971 (2010), *with Masterson v. Diocese of Nw. Tex.*, ---S.W.3d ---, 2013 WL 4608632 (Tex. Aug. 30, 2013), *and All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 685 S.E.2d 163 (S.C. 2009).

by the U.S. Supreme Court in *Jones.*[7] That issue is particularly salient here, because even Appellants told *this Court* that *Brown v. Clark*[8] was clearly a deference case before turning around and insisting that Brown actually applied neutral principles.[9]

The issues the Episcopal Parties identified in their opening brief more than satisfy Rule 18.2's substantial-grounds threshold. Contrary to Appellants' claim that this case is about state law, all three of the primary grounds for seeking *certiorari* are purely federal questions:

(1) The retroactivity issue, which the Supreme Court of the United States described as a question of federal constitutional "free-exercise

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[7] 443 U.S. at 606 n.4. The Falls Church petition used the term "retroactive," but that case had nothing to do with the actual retroactivity issue raised in *Jones.*

[8] 116 S.W. 360 (Tex. 1909).

[9] *Compare* Defendants' (Appellants') Statement of Jurisdiction at 15 ("Whether Texas courts should apply Neutral Principles (as most other states) **or revert to *Brown*'s Loyalty Rule** is a question this Court can best answer." (emphasis added)), *with* Appellants' Resp. to Mot. for Reh'g at 7 ("This Court 'adopted' Neutral Principles without using that name in 1909 just as clearly as the Supreme Court held Georgia had done in 1969."). Appellants explain that what they call the Loyalty Rule in *Brown* is the *Watson* deference doctrine for church property cases. Appellants' Statement of Jurisdiction at 5 ("Loyalty Rule: upon a division in a 'hierarchical' church, those remaining 'loyal' are entitled to possession of property. . . . [The rule was] borrowed from the U.S. Supreme Court's 1871 opinion in *Watson v. Jones*."). Indeed, even *after* this Court issued its opinion here, Appellants told yet another court that *Brown* was a deference case, again demonstrating that neutral principles was never "clearly enunciated" to churches as Texas law before this dispute. *See* Tr. of Hr'g on Objection to J. at 21, lines 20-25, *In re Lillian M. Burns Trust*, No. 177,121-C (89th Dist. Ct.—Wichita Cnty., Sept. 16, 2013). ("The Supreme Court [of Texas] says that a trust is determined on neutral principles of Texas trust law. . . . [T]heir decision back in the early 1900s on deference, that is no longer the law in Texas.").

rights,"[10]

(2) The continued viability of the neutral principles approach, which the Supreme Court held turns on whether "compulsory deference is necessary in order to protect . . . free exercise rights,"[11] and

(3) The split among state courts as to whether an express-trust canon trumps contrary state law, which again turns on "the burden on . . . the free exercise of religion . . . ."[12]

All three of these issues deal with the meaning and scope of the First Amendment's free-exercise guarantee.

Furthermore, Appellants are mistaken that the Episcopal Parties' arguments are "premature until the trial court [rules] on remand."[13] An interlocutory posture will not prevent the Court from reviewing an "important and clear-cut issue of law that is fundamental to the further conduct of the case."[14] This Court has fully addressed the constitutional questions above, and they are wholly distinct from the issues that will remain open or arise on remand. The trial court cannot reconsider

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[10] *Jones*, 443 U.S. at 606 n.4.

[11] *Id.* at 605.

[12] *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 453 (Ga. 2011), *cert. denied*, 132 S. Ct. 2772 (2012).

[13] Resp. at 6.

[14] Eugene Gressman et al., Supreme Court Practice 281 (9th ed. 2007); *see also, e.g.*, *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527 (2008); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

this Court's rulings on the retroactivity question and the viability of neutral principles. And this Court has already held that the Church's express-trust clause "is not good enough under Texas law" to comply with Texas Property Code § 112.051 requiring express language of irrevocability.[15] While the Episcopal Parties have other arguments to press on remand to enforce the clause, the split is ripe between this Court's holding and those of Georgia, Connecticut, and other states ruling that compliance with state express-trust statutes is unnecessary under *Jones v. Wolf*.[16] This case is thus nothing like *Senne v. Village of Palatine*—the grounds presented have been fully and finally resolved, not "left . . . for the district court to address on remand."[17]

Appellants vastly overstate the burden and rarity of stays pending disposition of a petition for writ of *certiorari*. Appellants urge this Court to follow the federal standard for granting a stay rather than the plain language of Texas's Rule 18.2.[18] The federal standard for a stay requires a "reasonable probability" that the U.S. Supreme Court will grant *certiorari* and a "fair prospect" that the

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[15] *Episcopal Diocese of Fort Worth v. Episcopal Church*, No. 11-0265, 2013 WL 4608728, at *6 (Tex. Aug. 30, 2013) (quoting *Masterson*, 2013 WL 4608632, at *17).

[16] *See, e.g.*, *Timberridge*, 719 S.E.2d at 454 (holding that the "fact that a trust was not created under our state's generic express (or implied) trust statutes does not preclude the implication of a trust on church property under the neutral principles of law doctrine").

[17] Resp. at 6 (citing *Senne v. Village of Palatine, Ill.*, 695 F.3d 617 (7th Cir. 2012) (Ripple, J., in chambers)).

[18] Resp. at 1.

Court will reverse,[19] as opposed to the lower burden under Texas law of showing merely "that the grounds [for a petition] are substantial."[20] Further, federal law requires a likelihood of "irreparable harm"[21] rather than Rule 18.2's less onerous requirement of a showing of "serious hardship."[22] Texas law clearly governs this procedural issue.[23] But even under the higher federal standard, Chief Justice Roberts has recently explained that "there is a reasonable probability that [the Supreme Court of the United States] will grant certiorari" where, as here, there is a "split" of authority on an important federal issue.[24] And "there is a fair prospect [the] Court will reverse the decision below" where there is "considered analysis of courts on the other side of the split."[25] As Appellants' own parent organization, ACNA, has recognized, there is a split among "13 state supreme courts and one federal circuit" as to the proper interpretation of *Jones*. Courts on both sides have given the issue "considered analysis."[26]

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[19] *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J.).

[20] Tex. R. App. P. 18.2.

[21] *King*, 133 S. Ct. at 2.

[22] Tex. R. App. P. 18.2.

[23] Tex. R. App. P. 1.1 ("These rules govern procedure in appellate courts and before appellate judges . . . .").

[24] *King*, 133 S. Ct. at 2.

[25] *Id.*

[26] *Compare Masterson*, 2013 WL 4608632, *and All Saints Parish Waccamaw*, 685 S.E.2d 163, *with Timberridge*, 719 S.E.2d 446, *and Gauss*, 28 A.3d 302.

II. The Episcopal Parties Would Suffer Serious Hardship from the Mandate's Issuance if the United States Supreme Court were Later to Reverse.

The claim that the Episcopal Parties will not suffer serious hardship is equally ironic when Appellants' parent organization just argued the opposite to the U.S. Supreme Court: "[T]hese lingering questions . . . lead to costly litigation . . . ."[27] Not staying the mandate and forcing parallel appellate and trial-court proceedings would cause the exact harm of unnecessary, duplicative, and costly litigation that ACNA decried when urging *certiorari*: "Such costly litigation has severely stifled the ability . . . to perform the missionary and charitable works for which they were founded."[28] And Appellants themselves urged the same harm as a basis for a stay in the trial court: "the parties' money must be spent—and potentially wasted—if the remaining claims must be tried before there is an appeal."[29]

The same is true for The Episcopal Church and the local Episcopalians: enduring unnecessary depositions, document review (including hundreds of deeds), new summary judgment briefing and hearings, and other potentially unnecessary proceedings below makes no sense for either party. What makes sense is allowing

[27] ACNA Br. at 1-2.

[28] *Id.* at 5.

[29] Defendants' (Appellants') Mot. to Sever and Stay Remaining Proceedings at 4, *Episcopal Church v. Salazar*, No. 141-237105-09.

the Episcopal Parties to exercise their right to petition while maintaining the status quo, just as Appellants have done for far longer, to address what Appellants' own parent organization concedes is "the confused state of the law" worthy of *certiorari*. That is precisely what Rule 18.2 is for.

Finally, Appellants' claim that they, rather than the Episcopal Parties, are the ones suffering hardship under the status quo is unpersuasive. Appellants have possessed the vast majority of the property at issue since the schism and through their lengthy direct appeal. Appellants complain about the financial reporting obligations that the trial court imposed for the duration of the appeal, but Appellants neglect to tell the Court *why* the trial court did so. Appellants told the trial court during bond proceedings that:

- "In this case, there is no evidence of dissipation or transfer [by Appellants] . . . "[30]

- "And, by the way, the accounts that [the Episcopal Parties are] talking about, they've got a bigger value today than they did at the time of separation. They haven't gone down, they've gone up."[31]

- "The bank accounts of the Diocese are maintained with Frost Bank [in Fort Worth]."[32]

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[30] Defendants' Mot. to Set Supersedeas at 7, *Episcopal Church v. Salazar*, No. 141-252083-11.

[31] Rep.'s R., March 31 Hr'g at 30.

[32] Defendants' Mot. to Set Supersedeas, Ex. B (Second Parrott Aff. at 1), *Episcopal Church v. Salazar*, No. 141-252083-11.

As the court-ordered deposition of Appellants' Director of Business and Finance later revealed, these representations were not accurate. For instance, the evidence demonstrated:

> Q. So operating accounts . . . [have] a total of $547,030.13 gone between October 31st, 2008 and February 28, 2011 from these 12 accounts; is that correct?
>
> A. That's what it adds to, yes, sir.[33]
>
> * * *
>
> Q. [W]e wouldn't expect hundreds of thousands of dollars to disappear from operating accounts, would we?
>
> A. I would not, no, sir.
>
> Q. Okay. We could call that dissipation, couldn't we?
>
> A. Yes, sir.[34]
>
> * * *
>
> Q. Why didn't you tell the Court about the Louisiana bank account?
>
> A. Because at the time, it did not enter my mind. I forgot.[35]
>
> * * *
>
> Q. Why wasn't [the Louisiana account] listed on the books?
>
> A. I don't have an answer to that. It just wasn't.[36]
>
> * * *
>
> Q. So you thought that that money would be harder for a court to reach out of state?

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[33] Hr'g on the Mot. to Continue Hr'g on Supersedeas Bond Amount, May 19, 2011, Rep.'s R., Vol. 1, Ex. 1 (Parrott Dep. at 63:12–64:4), *Episcopal Church v. Salazar*, No. 141-252083-11; *see also* Response to Defendants' Motion to Set Supersedeas at $0, Ex. A, *Episcopal Church v. Salazar*, No. 141-252083-11 (same).

[34] *Id.* at 55:5-15.

[35] *Id.* at 88:3-6.

[36] *Id.* at 98:3-7.

A. That is not what I said, but that was the thought of the Diocese, not of me, but of the Diocese, that was the decision that was made.[37]

Thus, there was ample support for the trial court's decision to require security and to impose reporting requirements related to the property, and those requirements should remain in place. If the mandate issues and the trial court lifts those burdens during a petition for writ of *certiorari* as Appellants now demand, the potential "serious hardship" to the Episcopal Parties under Rule 18.2—based on the evidence above—would be far greater. In fact, Appellants have already filed a motion in the trial court to set aside the bond and the additional protection, and there is a hearing set for April 24, 2014 on those issues.[38]

CONCLUSION AND PRAYER

For the reasons expressed in their Emergency Motion, the Local Episcopal Parties and Local Episcopal Congregations respectfully move this Court to recall and stay issuance of its mandate or, alternatively, to stay execution of the mandate, pending disposition of a petition for writ of *certiorari* by the Supreme Court of the United States. The Local Episcopal Parties and Local Episcopal Congregations also request all other relief to which they are entitled.

[37] *Id.* at 93:18-22.

[38] Fiat, Mar. 28, 2014, *Episcopal Church v. Salazar*, No. 141-252083-11.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 31st day of March, 2014, the foregoing Reply was filed electronically and, therefore, this document was served on all counsel.

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